

**Branch International Services, Inc. and Local No. 267, International Union, Allied Industrial Workers of America, AFL-CIO and William R. Lange.** Cases 7-CA-31616 and 7-CA-31758

April 15, 1993

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS  
DEVANEY AND OVIATT

On March 25, 1992, Administrative Law Judge Robert W. Leiner issued the attached decision. The Respondent filed exceptions.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and has decided to affirm the judge's rulings, findings,<sup>1</sup> and conclusions<sup>2</sup> and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Branch International Services, Inc., Auburn Hills, Michigan, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

<sup>1</sup>The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In addition, the Respondent contends that some of the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that these contentions are without merit.

<sup>2</sup>The Respondent excepts, inter alia, to the judge's failure to dismiss the complaint allegations related to the charge filed in Case 7-CA-31758 on 10(b) grounds. The Respondent claims that dismissal of these allegations is proper solely because it purportedly did not receive a copy of the April 11, 1991 charge prior to the issuance of the consolidated complaint on June 18, 1991. As more fully described in fn. 1 of his decision, the judge made several handwriting comparisons which led to his finding that the Respondent had actual receipt of the charge on April 16, 1991. In rejecting the Respondent's 10(b) argument, we find it unnecessary to rely on the judge's handwriting/analysis or his specific finding of an April 16 receipt of the charge by the Respondent. Rather, we note that the Respondent does not dispute its actual receipt of the June 18 consolidated complaint and the June 21 facsimile transmission of the charge and that both of these dates fall within the 6-month time period prescribed by Sec. 10(b). See *Buckeye Plastic Molding*, 299 NLRB 1053 (1990). We, therefore, find no merit in the Respondent's exception.

We note that there are no exceptions to the judge's discussion in which he concluded that he improvidently granted the General Counsel's permission to amend the complaint at the hearing and to allege a violation of Sec. 8(d) of the Act based on an automatic contract renewal theory.

*John Ciaramitaro, Esq.* for the General Counsel.  
*William M. Saxton, Esq.* and *Linda Deitch, Esq. (Butzel Long)*, of Detroit, Michigan, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT W. LEINER, Administrative Law Judge. This consolidated matter was heard in Detroit, Michigan, on December 16-18, 1991, on General Counsel's consolidated complaint, dated June 18, 1991<sup>1</sup> which alleges, in substance, that

<sup>1</sup>Respondent admits that, as alleged, the original charge in Case 7-CA-31616 was filed by Local No. 267, International Union, Allied Industrial Workers of America, AFL-CIO (the Union or the Charging Party), on March 5, 1991, and served by certified mail on Respondent, Branch International Services, Inc., on or about March 7, 1991. Although the consolidated complaint fails to allege the further fact, the index and description of the documents in G.C. Exh. 1 and particularly G.C. Exhs. 1(c) and (d) show that an amended charge in Case 7-CA-31616 was filed by the Union on March 7, 1991, and served on Respondent by certified mail on or about March 8, 1991. In view of Respondent's failure to object to the receipt in evidence of G.C. Exhs. 1(c) and (d), and in view of the affidavits of service and green Postal Service receipt cards attached thereto, I find that the amended charge in Case 7-CA-31616 was filed and served as above noted.

The consolidated complaint also alleges the April 11 filing and April 15, 1991 service of a charge by the Union in Case 7-CA-31758. Respondent's answer denies that it was ever served with that charge prior to the issuance of the consolidated complaint. Further, Respondent asserts (R. Br. p. 2) that it did not receive a copy of that charge nor did it learn about it until June 18, 1991, when it received service of the consolidated complaint carrying the two charge numbers of the caption. Consistent with Respondent's pleaded denial, Respondent's president, Charles Garavaglia, testified (Tr. 560), after examining a signature on the Postal Service green card showing Respondent's receipt of the charge in Case 7-CA-31758, that he did not recognize the signature; that he knows the signatures of the persons who worked for Respondent; that they were not the signatures of any of these persons who had authority to receive mail on behalf of Respondent and that no authorized signature was appended to the green card (Tr. 560-561).

Respondent argues, consistent with President Garavaglia's testimony, that the presumption of delivery of mail processed by the Postal Service has been rebutted and that since there was no proof of service of the charge, and there being no further testimony of such proof, the complaint allegations supported by the charge in Case 7-CA-31758 must be dismissed, being issued in violation of Sec. 10(e) of the Act.

On such a record, therefore, I have examined the signature on the green Postal Service card apparently showing receipt of the charge in Case 7-CA-31758 (G.C. Exh. 1(f)) and have compared that signature with the signatures on Postal Service green cards which Respondent admits having received either explicitly or by its above failure to deny. In short, I have compared the admitted green card signatures on G.C. Exhs. 1(b) and (d) with the contested signature on G.C. Exh. 1(f).

I find that all signatures flow from the same person. I further conclude that since Respondent admits having received the original charge (G.C. Exh. 1(a)) by virtue of the green card receipt signed in G.C. Exh. 1(b), and since the same signatures appear on all three green cards, that Respondent, contrary to Garavaglia's specific testimony, had actual receipt of G.C. Exh. 1(f) on or about April 16, 1991 (notwithstanding of course, that the underlying affidavit of service by mail is dated April 12, 1991). As the trier of fact, I am legally competent to make the signature comparisons. See *Loy Food Stores*, 259 NLRB 305 fn. 2 (1981); Fed.R.Evid. Sec. 901(b)(3); and

Branch International Services, Inc. (the Respondent) violated Section 8(a)(1), (3), and (5) of the Act by instituting an unlawful lockout commencing March 5, 1991; violated Section 8(a)(5) of the Act in refusing to negotiate and bargain with respect to certain grievances; and, independently, violated Section 8(a)(1) of the Act by unlawfully soliciting representatives of a labor organization (Local 124, IBT) to organize replacement employees and offering assistance to the labor organization.

The consolidated complaint alleges and Respondent admitted that a certain collective-bargaining agreement binding Respondent and the Union expired by its terms on March 4, 1991. At the opening of the hearing, however, over Respondent's objection, I permitted General Counsel to amend the consolidated complaint (General Counsel having provided prior notice to Respondent therefore) by eliminating the allegation of the expiration of the contract, by substituting the assertion that the contract automatically renewed itself from year-to-year and that the lockout therefore also violated Section 8(d) of the Act. (Consolidated complaint par. 23; G.C. Exh. 2.) Thereafter, Respondent duly withdrew its admission and pleaded a denial to that amended allegation.

Respondent's answers, both written and pleaded at the hearing, were timely, denied certain allegations of the consolidated complaint, and its amendments, admitted other allegations, but denied the commission of unfair labor practices.

At the hearing, all parties were represented by counsel, were given full opportunity to call and examine witnesses, to submit relevant oral and written evidence, and to argue orally on the record. At the close of the hearing, the parties waived final argument and elected to submit posthearing briefs which have been carefully considered.

On the entire record, including the briefs, and on my most particular observation of the demeanor of the witnesses as they testified, I make the following

#### FINDINGS OF FACT

##### I. RESPONDENT AS STATUTORY EMPLOYER

The complaint alleges, Respondent admits, and I find, that at all material times Respondent, an Indiana corporation maintaining a place of business in the city of Auburn Hills, Michigan, is engaged in the business of leasing employees to other employers and is engaged in interstate commerce or serving as a critical link in interstate transportation of freight and commodities. Respondent admits that in the year ending December 31, 1990, a representative period of its operations, in the course and conduct of its business operations, it provided employee leasing services valued in excess of \$50,000 directly to customers located outside the State of Michigan which customers annually purchased goods and materials valued in excess of \$50,000 which were shipped directly to their Michigan facilities from points located outside the State

*Action Auto Stores*, 298 NLRB 875 (1990), *enfd.* 951 F.2d 349 (6th Cir. 1992); *Auto Workers Local 259 (Atherton Cadillac)*, 276 NLRB 276, 293 and cases cited therein (1985).

In any event, the underlying original charge in Case 7-CA-31616, alleging violation of Sec. 8(a)(5), which Respondent concedes that it timely received (R. Br. p. 24, fn. 18), is sufficiently broad ("the 'above-named employer has bargained in bad faith and is engaged in illegal lock-out'") to support all allegations in the consolidated complaint.

of Michigan. I accept Respondent's further concession and find that, at all material times, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and I so find.

##### II. THE UNION AS STATUTORY LABOR ORGANIZATION

The complaint alleges, Respondent admits, and I find that Local No. 267, International Union, Allied Industrial Workers of America, AFL-CIO (the Union or Charging Party) is a labor organization within the meaning of Section 2(5) of the Act.

##### III. THE ALLEGED UNFAIR LABOR PRACTICES

###### A. *The Pleadings and Background*<sup>2</sup>

The consolidated complaint alleges and Respondent admits that the following unit of its employees constitutes a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All employees employed by Respondent and leased to National Metal Processing Inc. but excluding guards and supervisors as defined in the Act.

The consolidated complaint, however, also alleges, and Respondent also admits (consolidated complaint par. 19):

On or about December 5, 1990, Respondent . . . and the Charging Union entered into an agreement whereby Respondent recognized the Charging Union as the exclusive collective-bargaining representative of the employees in the unit set forth [above] and assumed a collective-bargaining agreement between Atlantic and the Charging Union which by its terms was effective from March 4, 1988 to March 3, 1991.

The above-described representational relationship between the Union and Respondent grew out of the following circumstances:

On January 30, 1974, as a result of a Board-conducted election, the Union was certified as the 9(a) statutory representative of the employees of *National Metal Processing*, in the following unit:

All production and maintenance employees, including truckdrivers and shipping and receiving employees, employed by the Employer at its 3105 Beaufait Street, Detroit, Michigan, location; excluding office clerical employees, guards and supervisors as defined in the Act [Case 7-RC-12145; R. Exh. 2].

National Metal Processing, Inc. (National) along with three other separately incorporated employers at or near the same Beaufait Street, Detroit location, are wholly owned subsidiaries of Meridian National Corporation (Tr. 378; 403). All such subsidiaries are engaged directly or indirectly in the steel business; National Metal Processing "pickles" steel for use as car bumpers.

Commencing in or about 1988, National no longer directly employed its unit production and maintenance employees;

<sup>2</sup> Respondent also admits that Charles Garavaglia, president, and Joe Pulis, plant manager, are its supervisors and agents within the meaning of Sec. 2(11) and (13) of the Act.

rather, commencing on or about March 4, 1988, it leased employees from Atlantic Western Personnel Leasing Corp., a supplier of leased employees. Those leased employees were, or became, represented by the Union and their terms and conditions of employment were memorialized in a collective-bargaining agreement (G.C. Exh. 4) which, by its terms, was to expire March 4, 1991.

The 1988–1991 Collective-Bargaining Agreement  
Between Atlantic Western Personnel Leasing  
and the Union

By virtue of section 1.2 of the agreement (G.C. Exh. 4), the employer (Atlantic Western) recognized the Union as the sole bargaining agent of employees in a unit substantially the same as that defined in the 1974 Board certification (R. Exh. 2).<sup>3</sup>

*SECTION 1.2* The term “employees,” as used in this Agreement, shall include all production and maintenance employees including truckdrivers and shipping and receiving employees. Excluded are all of its clerical employees, guards and supervisors and professionals as defined in the Act. It is understood by all parties that the Company will retain the control and right to up grade the complete plant during the life of this agreement.<sup>4</sup> [Emphasis in the original.]

The agreement (G.C. Exh. 4) contains separate and substantially different wage rates for production, maintenance and shipping and receiving employees: the maintenance, and shipping and receiving employees, in particular, enjoy a substantially greater wage scale than production employees.

By article XIV, the agreement provides for a production “incentive program.” Production employees actually engaged in the production process received incentive payments based upon production in an 8-hour shift either on the basis of “racks” handled or “tonnage” produced (sec. 14.3). The agreement specifically provides that only employees engaged in the production process on either a full-time or part-time basis receive incentive pay (sec. 14.2; 14.2).

Article XV of the agreement relates to “termination”:

*SECTION 15.1* This agreement shall remain in full force and effect until March 4, 1990 [extended by the parties to March 4, 1991], inclusive and shall automatically renew itself from year-to-year thereafter unless at least 60 days and not more than 90 days before the termination date or anniversary date of this agreement, either party gives notice to the other of the desire to amend, add to, terminate, or subcontract from this

agreement. If such notice is given, the parties shall, within a reasonable time thereafter, enter into negotiations. If the parties do not arrive at a mutually satisfactory agreement on the proposed amendments or additions, by the termination date or anniversary date of this agreement, this contract shall continue in full force and effect until such agreement upon five (5) days’ written notice.

Sometime after execution of the above collective-bargaining agreement, Atlantic Western went out of business and Primary Services, Inc. succeeded Atlantic Western as the lessor of employees to National. Primary Services, Inc. continued to be bound by the collective-bargaining agreement.

On or about May 29, 1990, Respondent purchased Primary Services’ customer list, one of the customers being National Metal Processing Inc. By early June 1990, Respondent and National Metal Processing agreed that National Metal Processing would thereafter lease employees from Respondent and that Respondent would provide such employees to National (Tr. 403–405). At or about the same time, in a meeting between Respondent’s president, Garavaglia, and the union representative, Garavaglia told the Union that he would assume the collective-bargaining agreement between Western and the Union (Tr. 47). Thereafter, by letter dated July 5, 1990, Respondent notified the Union that it had voluntarily assumed the collective-bargaining agreement between the Union and Atlantic Western. On August 9, 1990, Respondent and National Metal Processing entered into a formal agreement under which National Metal Processing would lease its production, supervisory, maintenance, and other employees from Respondent (G.C. Exh. 6). While the Respondent considers the desires of National Metal Processing, Respondent makes the final determination with regard to its bargaining demands and positions concerning wages, hours, benefits, and other terms and conditions of employment between Respondent and the Union. There is no suggestion on the record that National Metal Processing enjoys a legal status with regard to control over the terms and conditions of employment of employees working on its premises so as to make it a single or joint employer with Respondent, nor has General Counsel made any such suggestion.

Thereafter, at a grievance meeting held on December 5, 1990, Respondent formally recognized the Union, executing a document assuming the contract between Atlantic Western and the Union with no changes (G.C. Exh. 5; Tr. 45–47; Tr. 423–425). Respondent concedes that the actual recognition occurred on June 14, 1990, the subsequent execution of the formal recognition being a confirmation of the prior agreement of June 14, 1990 (Tr. 46).

Collective Bargaining Between the Parties

On or about October 12, 1990, Local Union President Arthur Evans telephoned Respondent’s president, Charles Garavaglia, and asked to reopen the contract to clear up alleged contract inequities and to start negotiations for a new contract. Garavaglia conceded that Evans stated that he desired to reopen the old contract and not terminate the existing agreement regardless whether there was bargaining for a new contract (Tr. 568).

Garavaglia agreed to open the contract for negotiations at any time or place so that they could come to an agreement

<sup>3</sup>As appears in the text, the only perceived differences are that the unit described in the agreement does not specify the location or address of the included unit employees and also adds to the excluded categories the category “professionals.” With regard to the included categories, the categories appearing in the agreement are identical to those appearing in the Board certification of 1974. In fact, Respondent’s answer (par. 11) asserts that the unit pleaded in the complaint merely describes the *contract* unit. I conclude that, notwithstanding the pleadings, and in view of the answer, the unit which appears in the agreement (G.C. Exh. 4) is the “appropriate unit” in this case (Tr. 35).

<sup>4</sup>The collective-bargaining agreement also includes both a check-off provision and a 31-day union-security provision (secs. 1.4; 2.1).

they could all live with. Garavaglia and Evans, in a subsequent grievance meeting of late November 1990 again discussed reopening after which Garavaglia notified (G.C. Exh. 7) the Union that "Branch International Services Inc. is willing to commence negotiations immediately on a new Collective Agreement for employees' contracted to National Metal Processing." The letter thereafter states that Garavaglia would be the chief negotiator assisted by Joseph Pulis and requested the names of the union negotiators and the nature of the Union's ratification process. The letter stated, however, that the negotiations were to be for a limited time only, to be completed no later than December 14, 1990, unless otherwise agreed by the parties. Finally, the letter states that if no new agreement is reached, the "present agreement would continue to its actual termination date with no strike, slow down or lockout permitted by either party."

#### The Collective Bargaining of December 5, 1990

On December 5, 1990, the parties met in collective bargaining pursuant to the terms of the reopening agreement. President Garavaglia and Joseph Pulis, a Respondent employee assigned to be plant manager at National Metal, represented Respondent. William F. Lange (director of region 6 of the Charging Party's International Union), Local President Evans and two employees (Givhan and Campbell) represented the Union. At this session, Respondent presented the Union with a complete contract proposal which Respondent described, article by article. The union representatives made no comment, said that they would review the proposals and respond.<sup>5</sup> The union representatives told Garavaglia that they didn't think that Respondent's "proposal was going to fly early" (Tr. 59).

In any event, following this meeting, the Union, on December 11, 1990, notified Respondent that the Union's committee had reviewed Respondent's contract proposals and concluded that the Union did not "find [further] negotiations to be beneficial at this time. Therefore, we will act in accordance with the expiration date of the current Labor Agreement, and begin negotiations at that time" (G.C. Exh. 8).

On the same day that the Union wrote to Respondent, above, that the Union would await the termination date of the contract, the parties held a grievance meeting (Tr. 229–230). Union President Evans repeated to Garavaglia the Union's rejection of the Respondent's contract proposals and that the Union would wait until the expiration of the contract for further contract negotiations. Garavaglia told Evans that when contract negotiations were resumed, Respondent would make the same contract proposal that the Union had rejected (Tr. 230).

#### The Misdirected Union Notice of Termination of the Collective-Bargaining Agreement

As above noted, the collective-bargaining agreement to which the parties were bound expired March 4, 1991.

The Union maintains an office file indicating the day on which the Union was to give notice of contract termination

<sup>5</sup> It was at this collective-bargaining session that Respondent presented the Union with its formal assumption without change of the existing contract, originally between Atlantic Western and the Union. National Metal was also a signatory to this document presented by Respondent to the Union.

under Section 8(d)(1) and (2) of the Act: the statutory requirements of notice of termination and the commencement of negotiations for a new collective-bargaining agreement.<sup>6</sup>

There is no dispute that approximately 15 days prior to January 4, 1991 (January 4, 1991, is 60 days prior to the expiration date of the collective-bargaining date, March 4, 1991), Lange, on behalf of the Union, sent a letter by certified mail to Garavaglia stating its desire to terminate the collective-bargaining agreement and begin negotiations on the new agreement (G.C. Exh. 9; Tr. 170). Unfortunately, Lange's secretary addressed this notice to National Metal Processing, Inc. rather than to Respondent. No copy was sent to Respondent (Tr. 170). Lange testified that he first discovered the error, upon checking his file, on January 4, 1991, at which time he directed the secretary to immediately address the same notice that had been mailed to National Metal Processing to Respondent and to send it by certified mail (Tr. 170). On cross-examination, Lange admitted that if he sent the notification to Respondent on January 4 (G.C. Exh. 9), then he first discovered the mistake on January 3, 1991 (Tr. 172), rather than January 4.

Garavaglia testified that on January 3 he received a phone call from Lange who asked him if he had already received the letter reopening the contract (Tr. 426–427). Garavaglia told him that he had not received it. Lange said that he had not received it because his office clerical mistakenly sent the letter to National Metal notwithstanding that it had Garavaglia's name on the letter. Garavaglia testified that Lange then said: "[Y]ou are not going to try to tie me up and say I did not send you an opening negotiation letter . . . ." (Tr. 427). Garavaglia said: "No, if you sent it over there, I accept it." Lange then said that he would send another letter to Garavaglia the next day (Tr. 427).

Lange testified that he did not recall the conversation; that he would not have talked to Garavaglia *on that day* because it was on New Year's Eve. When reminded that even January 2 was not New Year's Eve (Tr. 172), Lange said that he still would have not returned from northern Michigan on January 2; that he never returns until January 2 (Tr. 172–173).

In view of Garavaglia's otherwise credible testimony in the face of Lange's original testimony that he merely could not recall such a conversation and then gave varying accounts of why he could not have made the telephone call on January 2 when both he and Garavaglia testified that the call occurred on January 3 (compare Tr. 172 with Tr. 427), I credit Garavaglia's version and find that there was such a January 3, 1991 phone call; that Lange requested Garavaglia not to "tie [him] up" by refusing to accept the improper service of the opening negotiation letter; that Garavaglia said that he accepted the misdirected letter as timely and that Lange said he would send a properly addressed letter on the

<sup>6</sup> Sec. 8(d) of the Act, in pertinent part, states:

the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) Serves a written notice upon the other party to the contract of the proposed termination or modification 60 days prior to the expiration date thereof . . . .

(2) Offers to meet and confer with the other parties for the purpose of negotiating a new contract or a contract containing the proposed modifications . . . .

next day confirming the Union's desire to terminate the contract and begin new negotiations (Tr. 427).

In fact, Lange sent a letter to Garavaglia dated January 4, 1991 (Tr. 62, 170, G.C. Exh. 9), which Garavaglia received on January 7, 1991.<sup>7</sup>

The record shows that on January 7, 1991, Respondent replied (G.C. Exh. 11) to the Union's January 4 notification of termination and the request to commence negotiations for a new collective-bargaining agreement. Garavaglia requested the composition of the Union's negotiating committee, the available dates for negotiations, the Union's plans to request the presence of a Federal mediator, the Union's rules concerning ratification and the authority to execute the agreement. Having then not heard from the Union, Garavaglia commenced telephoning Union President Evans to arrange for negotiations.

On February 11, 1991, Evans provided the names of the Union's negotiating committee to Garavaglia and they agreed to meet the next day in collective-bargaining.

The parties met in collective-bargaining on February 12, 1991. The Union was represented by President Evans and Givan; Respondent by Pulis and Garavaglia. The Union presented Respondent with its initial contract proposal (G.C. Exh. 13) which was discussed by the parties. After reviewing the proposal, the parties agreed to meet again on February 18, 1991.

On February 18, 1991, the parties meet again with Respondent submitting a contract proposal (G.C. Exh. 15) which the parties reviewed. The parties reviewed, item by item, both Respondent's proposal and the Union's proposal (Tr. 441). Although the parties agreed to meet in collective bargaining the following day, Garavaglia told the Union that he had to have a contract by the end of the contract term, 11:59 p.m., March 4, 1991 (Tr. 442). Garavaglia admitted that Respondent's February 18 proposal was the same as that which it had submitted to the Union on December 5 during contract reopener negotiations, although there were some minor modifications (Tr. 571). Respondent's December 5, 1990/February 18, 1991 contract proposal to the Union included no monetary proposal (G.C. Exh. 13) but continued to recognize the unit as that which was contained in the expiring contract (G.C. Exh. 4). As above noted, except for the much earlier additional exclusion of the category "professionals," the 3-year contract, expiring March 4, 1991, to which Respondent was bound, continued the unit description found in the Board certification of representative. Thus the first Respondent contract offer continued to define the unit "employees" as including: "all production and maintenance employees, including truckdrivers and shipping and receiving employees." (Compare: G.C. Exh. 4 with G.C. Exh. 13.) But the February 18, 1991 proposal, the "first proposal" for the new contract, contained, however, among the "minor modifications" which Garavaglia mentioned in his testimony (Tr. 571) a change in the unit from that which appeared in the December 5 proposal: article 1, the recognition clause, in section 1.2 thereof, contains Respondent's demand that the

category "truckdrivers" be deleted (because there were none) (G.C. Exh. 15).

Apparently at every negotiation meeting (Tr. 78; 498) between February and April 1991, as the substance of those discussions is discussed hereafter, the question of a change in the unit appeared. At each collective-bargaining session, Garavaglia at first wanted to exclude maintenance and shipping and receiving employees (as well as drivers) and thereafter allegedly demanded to include the shipping and maintenance employees into an overall production employee unit with the same wages and incentives as production employees, and at each such collective-bargaining session, the Union consistently refused (Tr. 498).

Pursuant to the parties' agreement of February 18, they met again in collective-bargaining on February 25, 1991. As Union President Evans entered the meeting, Garavaglia presented him with a letter for his signature (the signature noting service of the letter) and told Evans that he was terminating the contract (Tr. 235). The letter (G.C. Exh. 16) states:

The Contract assumed for Atlantic Western under Article XV Termination alleges to require [sic] five (5) day notice to continue.

Branch's position is that the Contract presently being negotiated is a new contract for Branch and, therefore, not subject to amendments or additions and that this contract of Atlantic Western assumed for operating purposes until 11:59 p.m. on March 3, 1991 and will not be extended in any form past that date.<sup>8</sup>

When Garavaglia said that he was terminating the contract, Evans replied that the Union would like to work on a day-to-day basis. Garavaglia insisted that the contract would be terminated. Evans then asked him if he was going to lock out the employees and Garavaglia answered "maybe" (Tr. 237). Garavaglia stressed that time was of the essence and that the parties should avoid dragging out the bargaining sessions. After reviewing each other's prior proposals and indeed reaching tentative agreement on some items, the parties agreed to bargain again the next day.

At the February 26, 1991 collective-bargaining session, Lange joined the group bargaining for the Union. Lange told Garavaglia that the Union did not agree with the contents of Respondent's February 25 letter (G.C. Exh. 16, refusing to abide by article XV concerning renewal of the contract). Union President Evans stated that he had not agreed to the substance of the letter but only acknowledged its receipt.

Reviewing Respondent's noneconomic contract proposal, as Lange questioned each element of the proposal, Garavaglia would assert that the parties were at impasse on the point and move to the next element. When Lange objected to Garavaglia's repeated use of "impasse," stating that he was merely trying to understand Respondent's position, Garavaglia ceased using that term. The parties then reviewed the union proposal. Respondent accepted two or three

<sup>7</sup>Consistent with the statutory requirements of Sec. 8(d)(3) and (4) of the Act, Lange, on January 4, 1991, also sent notification of his desire to terminate the contract to the Federal Mediation and Conciliation Service and to the Michigan Department of Labor (Tr. 629, G.C. Exhs. 33(a) and (b)).

<sup>8</sup>The substance of this letter appears to state that Respondent would not abide by art. XV which appears to permit extension of the contract upon 5 days' written notice: "If the parties do not arrive at a mutually satisfactory agreement on the proposed amendment or additions, by the termination date or anniversary date of this agreement, this contract shall continue in full force and effect until such agreement upon five (5) days' written notice."

of the Union's proposals and stated that the rest would be considered. Respondent then presented its second non-economic proposal and a written economic proposal (G.C. Exhs. 17, 18). Respondent's first economic proposal ("Monetary proposal") included (a) a 10-percent reduction in pay for all employees making more than \$8 an hour; (b) an 8-percent reduction in pay for all employees making less than \$8 an hour; and (c) no increase in Respondent's incentive plan (G.C. Exh. 17). It also wanted to eliminate the attendance bonus (Tr. 99).

In its noneconomic proposal, Respondent again included its demand for a deletion of the "truckdriver" category from the unit (G.C. Exh. 18). At the end of the bargaining day, after lunch, Garavaglia stated that he had an oral proposal that he wanted to make to the Union: that the categories of *maintenance employees* and *truckdriver* be removed from the contract unit. Garavaglia said that Respondent did not want maintenance employees or truckdrivers in the Union (Tr. 78). Lange made a note of the Garavaglia proposal and made no response at that time (Tr. 80). Garavaglia complained of the serious employee attendance, drug and alcohol problems and, referring to the attendance bonus program, stated that Respondent did not intend to pay employees who did not show up for work.

Garavaglia told the Union that while he was willing to work 24 hours a day to reach a contract, he insisted on having a new contract in existence at the time of the expiration of the old one. Garavaglia reminded Lange of his earlier position that the Union would not work beyond the expiration of the contract (Tr. 450). The February 26 session ended on Lange's angry accusation concerning Respondent's proposed pay cut for unit employees. The parties nevertheless agreed to meet the next day, February 27, 1991. This meeting was canceled due to the death of National Metal Processing President DeGrazia.

The parties nevertheless bargained again on March 1, 1991. Respondent proposed a change in its production incentive system. This plan was based on the number of racks of steel or tonnage of steel produced by each production employee. While Respondent increased the incentive pay for both tonnage and racks, it also increased the "threshold qualification" for incentive by increasing the number of racks and tonnage required to qualify. The production incentive pay system represents about 25 percent of a production employee's earnings and was consequently a significant issue in the negotiations (Tr. 99).

Respondent furnished the Union with requested information concerning attendance and tardiness problems raised by Respondent in prior meetings. Lange told Garavaglia that in order for the Union to evaluate the change in the incentive system, the Union needed to know, by shift, the daily 12-month tonnage and rack production. Lange also demanded the identity and amount of money received by each production employee paid under the incentive system. Respondent agreed to provide the information, but Garavaglia told the union that it would be difficult to provide the information concerning Respondent's proposed change in the incentive pay program in the time remaining prior to contract expiration especially in that Respondent had limited access to National Metal's processing records. Garavaglia again reminded the Union of the necessity to engage in strenuous collective bargaining in order to reach a contract but the Union refused

to bargain on Saturday, March 3, 1991. Rather, they arranged to meet again on Monday, March 4, 1991.

On March 4, 1991, the last day of the contract, the parties met again. Lange told Respondent that he could not remain very long because he had another commitment. Garavaglia said that he wanted to meet even without the presence of Lange as they had done in February. The Union refused to negotiate without Lange. Respondent nevertheless presented the Union with certain incentive pay information covering a 1-week period and added a verbal report with regard to an additional 3- to 6-week period which was claimed to be representative of the entire year. Lange stated that the information was inadequate and that since the incentive pay was such a large proportion (Tr. 99, i.e., about 25 percent) of the production employees' pay, the Union could not intelligently bargain on the proposed change in the incentive pay system without the requested information. Garavaglia told Lange that it would take 2 weeks to get the information. Garavaglia testified (Tr. 490) that he presented a demand on March 4 that all the classifications in the certified unit be reduced to a single classification of all production employees. Garavaglia nevertheless presented the Union with a written contract proposal repeating the elimination of truckdrivers from the contract unit (G.C. Exh. 19). Contradicting Garavaglia, Lange credibly testified (Tr. 211) that Garavaglia demanded that maintenance employees be eliminated from the unit and denied that Garavaglia merely wanted all classifications in a single unit of production employees. In this regard I observe that Garavaglia admitted (Tr. 489-490) that he originally told Lange that he wanted the maintenance category "completely removed from the collective-bargaining unit" but that on March 4, he changed his mind (Tr. 490). I do not credit Garavaglia. Certainly, by April 26, Respondent was still insisting that maintenance employees "be entirely excluded from the unit" (Tr. 138-142).

Garavaglia told the Union that its March 4 contract proposal (G.C. Exh. 19) represented Respondent's "final position" (Tr. 104) that it had no further room to negotiate over open items (Tr. 104, 105); and that apart from items marked on the March 4 offer as "okay," Respondent was presenting its final position and had to have agreement on the open items (Tr. 104).

While Garavaglia wanted maintenance employees excluded from the unit, he demanded on March 4, that the shipping and receiving employees and truckers be classified only as "production employees." Under the existing contract, only production employees received incentive pay. Garavaglia said this produced constant friction because other employees did not receive similar incentive money when pressed into production work because of emergency conditions. Their refusal to work in production would sometimes result in Respondent having to shut down a production line (Tr. 488).

When Garavaglia stated on March 4 that there were still 42 open items to discuss, and notwithstanding that Lange had rejected the information concerning incentive pay which Respondent had produced as wholly inadequate ("bargaining in the dark," Tr. 285), Lange offered to work from day-to-day under the terms of the old contract and Garavaglia refused (Tr. 586). While Garavaglia said that they were at impasse on many items on the sheet he had presented, he said they

were not at overall impasse because he had not submitted a final economic offer (Tr. 106-8).

At the conclusion of the March 4 meeting, Garavaglia told the Union that unless there was a contract or that the bargaining showed that they were close to a contract, he would not permit the employees to work past the expiration of the old contract at midnight. Garavaglia nevertheless gave the Union an option: if the parties continued negotiating in good faith and were close to a contract, he would continue the terms of the present contract; if they were not close to a contract, the employees could work but would have to work under the terms of Respondent's last offer (Tr. 491). Under the latter alternative, the employees could work under the terms of Respondent's last noneconomic offer (G.C. Exh. 19) together with Respondent's last verbal economic offer of March 4 which (1) raised the incentive pay but also raised the threshold, (2) returned to the old contract production wage rates (Tr. 494), and (3) eliminated the 10-percent and 5-percent wage cuts previously proposed (Tr. 495).

Lange refused to work except under the terms of the old contract (Tr. 502) and told Garavaglia that the Union would tell its members that they were not through with negotiations but would work on a day-to-day basis until Respondents supplied the information concerning the change in the incentive plan. Lange said that he did not intend to negotiate in the closet "in the dark" (Tr. 101; 285). Lange inquired whether Garavaglia intended to lock out the employees and Garavaglia repeated what he had previously told Union President Evans: "Maybe" (Tr. 103). Garavaglia told Lange that he would refuse to permit the employees to work under the old contract on a day-to-day basis and accused Lange of failing to remain to bargain since the contract was rapidly coming to an end; that Lange was bargaining in bad faith and that Respondent would file charges against the Union for bargaining in bad faith (Tr. 101). Lange repeated that he would return to the bargaining table when Respondent supplied him with information concerning payments in the absentee bonus program and the production incentive program (Tr. 100-101). He told Garavaglia to contact him when Respondent had such information (Tr. 101). During the meeting, however, Lange urged the presence of the Federal Mediator. Garavaglia said that in the absence of impasse there was no necessity for the presence of the Federal Mediator (Tr. 106-108).<sup>9</sup>

As Respondent points out (Br., pp. 13-14), there have been no allegations made that Respondent failed to comply with its duty to furnish information to the Union and neither party ever gave a 5-day written notice to continue the contract in effect. Furthermore, no union representative has ever

suggested that Respondent has failed to give proper notice to terminate the contract or that the contract was not properly terminated or that it continued in effect for any time following the termination date of March 4, 1991.

#### The March 5, 1991 Lockout

About 2 to 3 weeks before March 4, Respondent interviewed potential temporary replacements in the event no agreement was reached by the time the contract expired. Consistent with President Garavaglia's repeated admonition that the employees would not be permitted to work beyond contract expiration date, after contract negotiations broke off on March 4, Respondent contacted the temporary replacements to inform them that they would be needed.

When the temporary replacements reported to work on March 5, 1991, Respondent reminded them of their temporary status and that they were being hired only on that condition, particularly advising them that their employment might cease if there was a settlement made with the Union. The temporary employees commenced work on March 5 on the basis of Respondent's implemented March 4 offer to the Union (Tr. 364).

When the old unit employees attempted to report to work on the morning of March 5, 1991, they found the gates locked; armed uniformed guards patrolling the facility inside the locked gates and discovered from the guards that they had been locked out. The employees then asked Respondent's supervisor, Walter Collins (Tr. 322-324), why they were not allowed to work and Supervisor Collins told them that they were locked out at the present time (Tr. 323).<sup>10</sup> Plant Manager Pulis told the locked-out employees that the contract having expired, there was no work available for them until the contract matter was settled (Tr. 349).

After Union President Evans left the plantsite on March 5, having observed the armed guards, he telephoned Garavaglia and told him that the parties still had a lot of grievances outstanding including a discharge grievance (Tr. 246). Garavaglia told him "the contract is dead and the grievances are dead" (Tr. 246). I do not credit Garavaglia's denial of this Evans testimony.

On or about March 12, 1991, Respondent wrote (G.C. Exh. 21) to the Union requesting continued negotiations, stating that it was ready and willing to negotiate at any time and on any date. Respondent reasserted its position that there were many outstanding issues for negotiation and that the parties should come to an agreement regarding Respondent's employees working at National Metal Processing Inc.

In reply, on or about March 19, 1991, the Union stated (G.C. Exh. 22) that Lange had spoken with Plant Manager Pulis on the previous day, March 18, and told him that the Union felt that Respondent was engaged in surface bargaining and that meaningful negotiation could take place only with a Federal mediator. Lange wrote that he had contacted a Federal mediator who was available in late March 1991, on specific dates (March 25, 26, and 29) for negotiation purposes. Finally, Lange, noting that the Union could only bargain intelligently over the incentive program if it possessed information requested at previous meetings, asked that Respondent furnish it with information relating to tonnage, rack

<sup>9</sup>I find, in any case, that the parties were not at impasse not only because neither party left the March 4 bargaining session believing that the parties had come to the end of their bargaining rope, but Lange clearly stated that he was willing and anxious to bargain further when Respondent provided the information concerning the economic terms (incentive plans, absentee bonus) that had not been supplied. Lange thereafter told the employees, on March 5, that they were not on strike and that negotiations would continue (Tr. 116). Moreover, Lange testified without contradiction that not only did Garavaglia, on March 4, say that the parties were not at impasse but that Garavaglia said that his March 4 economic proposal was not his final economic proposal (Tr. 106). See: *Huck Mfg. Co. v. NLRB*, 693 F.2d 1176 (5th Cir., 1982).

<sup>10</sup>The uniformed armed guards were apparently hired by National Metal Processing rather than Respondent.

count and total dollars involved; and in addition, information regarding the attendance bonus program.<sup>11</sup> On March 26, 1991, Respondent answered Lange's March 19 letter. Garavaglia stated, *inter alia*, that the parties did not need a mediator because Respondent had not given a final offer nor had the Union made a final offer. Garavaglia informed Lange of Respondent's willingness to continue negotiations, advising the Union that it had finally obtained the requested information involved in the incentive program and would supply it at the next negotiating meeting. Suggesting that the Union was engaged in bad-faith bargaining, Garavaglia claims surprise in that the Union's March 19 letter was asking for something new on the bonus program; that Respondent had given the original figures requested and that such figures given on March 1 had been satisfactory to the Union; that the Union was creating a new ploy in bad-faith bargaining. After urging Lange to negotiate in good faith for as long as it would take to put together a new contract, Garavaglia stated that if he heard that the Union contacted National Metal Processing again and made false statements, he threatened to sue Lange for defamation. As did Lange's March 19 letter, Garavaglia's March 26 response sent a copy to the counsel for the General Counsel.

On April 3, 1991, Respondent wrote (G.C. Exh. 28) to Local President Arthur Evans concerning meetings on outstanding grievances under the former contract,<sup>12</sup> the text being:

RE: Meetings On Outstanding Grievances Under the  
Former Contract

Sir:

To clarify, if there has been a misunderstanding, the Company, Branch International Services, Inc., is ready and willing to have any meeting on any outstanding grievances under the old contract.

Please contact this writer to set up the date in time for a meeting you might request.<sup>13</sup>

Pursuant to the above exchange of letters concerning grievances, a grievance meeting was held on April 16, 1991. At that time, the parties nevertheless considered and reviewed Respondent's outstanding economic and non-economic proposals and Respondent furnished the Union with additional documentation on the incentive plans racks and tonnage which the Union had requested. The evidence shows that in or as a result of the April 16 grievance meet-

ing, a total of six grievances were discussed including the discharge grievance (Tr. 520). The discharge grievance was sent to arbitration and the other five grievances resulted in disagreement and the Union took no action with regard to them. These grievances were therefore "tabled" (Tr. 520). The parties then agreed to meet again on April 22, 1991.

At the April 22, 1991 collective-bargaining session, the Union presented Respondent with a second economic proposal and Respondent presented the Union with a further economic proposal. Economic and noneconomic issues were still unresolved and the meeting was adjourned to April 24.

#### The Collective-Bargaining Session of April 24, 1991

At the opening of the meeting, Garavaglia presented Lange with a document (G.C. Exh. 26) which summarized the issues relating to their bargaining: items on which there was agreement and items which were in dispute. The Union then caucused and returned requesting that Respondent make a final offer and the presence of a Federal mediator. Garavaglia said that there were still many unresolved issues, that changes were still being made in the parties' respective bargaining positions, and that they keep bargaining to come to a mutually agreeable position. He told Lange that he had no intention of bringing in a Federal mediator until they came to impasse. Garavaglia nevertheless agreed to provide a final offer which the Union could pick up from Respondent's office on April 26, 1991.

The document which the parties reviewed at the April 24 bargaining session (G.C. Exh. 26) contains Respondent's typewritten notations concerning areas of agreement and disagreement<sup>14</sup> in particular positions of the parties with respect to changes derived from subsections in the expiring contract (G.C. Exh. 4). With regard to section 1.2, the unit description, the document shows no union agreement to providing a letter of understanding to cover the exclusion of "truck-drivers."

#### Respondent's Final Offer of April 26, 1991

On April 26, 1991, Lange visited Respondent's office and received from plant manager Pulis Respondent's final contract offer (G.C. Exh. 27). Lange asked Pulis if Respondent's final offer was the same as that which had been produced in negotiations or whether there had been any changes. Pulis told him that there were some changes (Tr. 135).<sup>15</sup> Pulis told Lange that there were changes in wages and in the incentive program, with Respondent adding 5 cents per rack to a total of 65 cents per rack on the incentives (Tr. 136) and restored a nickel per hour on the wages so that Respondent's proposed rate reduction was decreased (Tr. 137). The other change that Pulis mentioned was that the categories "maintenance" employees and "truckdriver" were removed from the unit description. Pulis told Lange that Respondent wanted those classifications (maintenance and truckdriver) to be "nonunion" (Tr. 138). Respondent, however, pointed out from the text of the April 26 final offer, that Lange's testi-

<sup>11</sup> Since the original charge in Case 7-CA-31616 was filed on March 5 and served on March 7, Lange's letter to Respondent shows, on its face, that a copy had been dispatched to counsel for the General Counsel who appeared in this case.

<sup>12</sup> As above noted, Evans testified that in his telephone conversation with Garavaglia on March 5, 1991, the first day of the lock out, when Evans mentioned the several outstanding grievances that still had to be addressed, including the discharge grievance, Garavaglia told him that the "contract was dead and the grievances were dead." Apparently in consequence thereof, the union filed its amended charge in Case 7-CA-31616 on March 7, 1991, which amended charge was received by Respondent on March 11, 1991 (G.C. Exh. 1(d)). That amended charge not only restates allegations of Respondent's bad-faith bargaining and illegal lockout, but asserts that: "Since on or about March 6, 1991, the above Employer has refused to bargain over and/or process existing grievances."

<sup>13</sup> Garavaglia sent a copy of this letter to NLRB Regional Director, Region 7 (G.C. Exh. 28).

<sup>14</sup> The document also contains certain handwritten material. The document, however, was offered without reference to the handwriting on the document (Tr. 132), and was received on that basis.

<sup>15</sup> I credit Lange's uncontradicted and otherwise credible testimony concerning his conversation with Respondent's plant manager, Pulis, on April 26, 1991. Pulis did not testify.

mony with regard to the exclusion of "truckdrivers" from the unit was incorrect (Tr. 141). The balance of Lange's testimony, with regard to Respondent's exclusion of "maintenance employees," however, was correct. In short, Respondent's written "final offer" with regard to the unit description is (G.C. Exh. 27):

*Section 1.2*

The term "employees," as used in the Agreement, shall include *all* production including truckdrivers and shipping and receiving employees. Excluded are all office clerical employees, guards and supervisors and professionals as defined in the Act.

Respondent conceded (Tr. 142) that it could not show that the Union agreed to the elimination of "maintenance employees" from the unit description in its April 26 final offer (G.C. Exh. 27).<sup>16</sup>

On Sunday, April 28, 1991, Respondent's final offer was submitted to the union membership for ratification and was unanimously rejected in a secret ballot vote (Tr. 143-144). On April 30, 1991, Lange told Pulis that the membership had rejected the final offer and that he would be contacting a Federal mediator.

Sometime thereafter, in May, a member of the union committee contacted the Respondent to resume negotiations and a meeting was arranged for May 23, 1991.

*The May 23, 1991 Collective-Bargaining Session*

At this meeting, the parties were augmented by Federal mediator Michael Nowakowski. Although the parties were separated, and the Federal Mediator received a copy of the last offer, no contract proposals were discussed at the meeting. When shown his contemporaneously recorded notes, Garavaglia testified that the notes did not refresh his recollection of what he said at the meeting (Tr. 608-609). Garavaglia's notes record the fact that he told everybody that Respondent's position was that "new charge is filed and negotiations would not go forward until Board makes a decision." (Tr. 609.) Garavaglia testified that his reference to a refusal to further negotiate related to the fact that the Federal mediator had suggested that Respondent file a charge with the NLRB to determine whether the ratification vote was

lawful (Tr. 619). Garavaglia further testified that he did file a charge with the Board (Tr. 619). Finally, Garavaglia testified that by use of the word "Board," he meant the Regional Office of the Board (Tr. 619). Garavaglia previously told the Union that a number of employees had complained that they had not been informed of the vote and had no opportunity to vote in the ratification.

No further collective bargaining occurred after the May 23 meeting.

*Garavaglia and the Teamsters; April 1991*

Around the time of the above April 16, 1991 grievance meeting and collective-bargaining session, Garavaglia, in his capacity as a labor consultant, was present at an arbitration in Pontiac, Michigan, representing an employer (Capital Transit Co.) in a grievance proceeding concerning the discharge of one of its employees. Garavaglia represented the employer. The grieving Union (Local 124, International Brotherhood of Teamsters) was apparently represented by its president, Gary Proctor, and its organizer, John H. Earhart. Earhart knew Garavaglia from his experience in negotiating contracts with him on behalf of the Teamsters (Tr. 291). The grievance related to a fistfight between Proctor and the discharged employee (Tr. 550).

Earhart testified that while he and Proctor were in an area apart from the rooms in which the arbitrations were conducted, Garavaglia approached them and spoke of an employer employing some 40-odd employees "that he would like to give us" (294); that he "wanted another union in there" (Tr. 307). Garavaglia, according to Earhart, identified the employer as National Metal. Earhart testified that from his prior experience in working with the Teamsters, he knew the identity of National Metal and that Atlantic Western Personnel Leasing was an employer with whom the Teamsters had a relationship (Tr. 294). In fact, Earhart previously had been marketing director for Atlantic Western Personnel Leasing (Tr. 294-295). He knew of the relationship between National Metal Processing and Atlantic Western Personnel Leasing (Tr. 295). Earhart testified that Garavaglia said that he wanted to get the 40-odd employees into Local 124. Proctor said that that sounds all right (Tr. 294). After Garavaglia specified National Metal Processing as the situs where the employees were working, Earhart said he called Proctor aside, within a few feet of Garavaglia, and told him that the unit working at National Metal "belongs to a fellow I know by the name of Bill Lange, and you can't take those people. They belong to a union." Proctor answered that he was going to take the people anyway. Earhart replied that that decision was up to Proctor; that Earhart was not the president of the Local; but that the employees already belonged to a union (Tr. 295). While Proctor and Earhart were speaking, in a normal tone, Garavaglia was standing about 3 or 4 feet away (Tr. 299).

At this point, Proctor turned to Garavaglia and said: "Well, we will see if we can work it out" (Tr. 296). Then, Proctor, turning to Earhart, became angry and said: "We are going to take those people" (Tr. 296). In response to Proctor's statement that he would see if he could work it out, Garavaglia answered "Okay" (Tr. 299). Earhart told Proctor that he was not going to get involved in it (Tr. 299-300). Earhart acknowledged that he had previously known Lange but denied that Lange was his friend (Tr. 303).

<sup>16</sup> Lange credibly testified that commencing with the very first collective-bargaining meeting that he attended on February 26, Respondent wanted maintenance employees out of the unit (Tr. 153). Although I have not credited Garavaglia's testimony that he thereafter changed his mind to the extent of wanting maintenance employees included, without separate unit definition, as part of "production" employees, there was no contradiction of Lange's testimony, appearing in the above text, that on April 26, Plant Manager Pulis told him that Respondent wanted maintenance employees excluded from the Union and from the unit. In addition, however, Lange testified that at the April 24 collective-bargaining session, Garavaglia also insisted that the position of "lab technician" should be excluded from the unit. The inclusion of the laboratory technician category in the production unit had been accomplished by a "memorandum of understanding" between National Metal Processing and the Union even before Atlantic Western came into the picture (Tr. 206). Under the expiring collective-bargaining agreement, the "lab technician" enjoyed a separate pay category among the production employees (Tr. 205). By the time of Respondent's appearance in 1990, no lab technician was employed.

Although Garavaglia was unsure of the date, he conceded that he spoke with Earhart and Proctor in April 1991 (Tr. 548–549). Garavaglia testified that while awaiting the decision on the discharge grievance, Earhart approached him, stating that he understood that he was having a problem at National Metal Processing. When Garavaglia acknowledged that there was a labor dispute, Garavaglia testified that Earhart said that he was an organizer and that he earns his living only by successfully organizing people (Tr. 551). Earhart then asked: “How about if I organize them?” (Tr. 551). Garavaglia said he told him that he could not organize employees that were already in a union and that there was no way to organize them in spite of the labor dispute (Tr. 551). Garavaglia said that Proctor turned to Earhart and said: “You know, John, you can’t go and try to organize someone who was already in the union and we have a [no-raid] agreement with the AFL–CIO . . . .” Garavaglia said that Earhart then told Proctor: “You know, you only pay me on the amount of people I bring in and I know these guys over there and I’m sure I can get them organized, signed up, and then I can get paid and you’ve got new members” (Tr. 551). Garavaglia then said he told them that he did not want any part of it and walked away after Proctor told Earhart that he “should not do things like that, you know that is not legal” (Tr. 551–552). In particular, Garavaglia denied ever having offered to assist Proctor or Earhart in organizing any National Metal Processing employees (Tr. 552). In fact, he testified, that he told them that he did not care which unions the employees belonged to and that it was their choice (Tr. 552).

#### Discussion and Conclusions

##### A. *The Improvident Permission to Amend the Complaint*

At the hearing, over Respondent’s objection, General Counsel was granted leave to amend the complaint and to allege, for the first time, that the contract between the Union and Respondent was automatically renewed and that Respondent, by locking out its employees, thereby also violated Section 8(d) of the Act.

Respondent, as it argued at the hearing, argues in substance, that the amendment to the complaint at the opening of the hearing, violates the proscription of Section 10(b) of the Act.<sup>17</sup> In particular, Respondent urges that the amendment fails to meet any of the three-part tests for complaint amendments following the expiration of the 6-month period following the filing of a lawful charge. In *Redd-I, Inc.*, 290 NLRB 1115 (1988), as Respondent notes, the Board announced its rule permitting amendments of complaint by adding allegations of violations outside the 6-month 10(b) period. The Board, in *Redd-I*, supra, stated that (1) the otherwise untimely allegations must be of the same class as the violations alleged in the pending timely charge. This means that allegations must all involve the same legal theory and usually the same section of the Act; (2) the Board examines whether the untimely allegations arise from the same factual situation and sequence of events as the allegations in the pending timely charge; and (3) the Board examines whether

the Respondent would raise the same or similar defenses to both allegations and thus whether a reasonable Respondent would have preserved similar evidence and prepare a similar case in defending against the otherwise untimely allegations.

With regard to the first issue, above, Respondent urges that the 8(d) allegations and the “renewal of the contract” allegations are not “of the same class” as the violations alleged in the pending timely charge. Respondent suggests that these amendments present “an entirely new legal theory” since they allege that the lockout was illegal per se because the contract was automatically renewed (because of a claimed failure of either party to give timely notice of intent to end or to terminate the contract). In view of General Counsel’s concession that the contract expired on March 4, 1991, Respondent argues (Br. p. 25) that neither the charge nor the original consolidated complaint raised the question of timely notice of termination of the contract. Indeed, the original complaint alleged only that the contract terminated on March 4, 1991. Further, the original charge did not allege a violation of Section 8(d) of the Act but merely violation of Section 8(a)(5) due to the lockout in retaliation for the Union’s refusal to accept the Respondent’s terms upon termination of the contract.

This matter has recently received Board and court interpretation in *NLRB v. Overnite Transportation Co.*, 938 F.2d 815 (7th Cir. 1991). In that case, the court properly distinguishes between Section 10(b)’s application to the timely filing and service of a charge compared to the issuance or amendment of the complaint, *NLRB v. Complas Industries*, 714 F.2d 729, 732 (7th Cir. 1983), noting that a different portion of Section 10(b) relates to the amendment of complaints. The ability to amend the complaint, as the court notes, is “not unfettered” under *NLRB v. Fant Milling Co.*, 360 U.S. 301, 309 (1959). In *Overnite Transportation*, supra, the Board, utilizing the *Redd-I, Inc.* rationale, found an independent violation of Section 8(a)(1) because that newly added allegation was “closely related” to the existing 8(a)(5) charge and complaint notwithstanding that it was made the subject of amendment after the running of the 6-month 10(b) period of limitation.

The court stated:

The Board then concluded that the two alleged violations were of the same class because, although not based on the same section of the Act, they were based on the same legal theory—“Overnite’s efforts to resist unionization.” The Board also found that the alleged violations arose out of the same factual situation or sequence of events because the alleged 8(a)(1) violation essentially consisted of statements in which Overnite threatened to act as it actually did act in the alleged 8(a)(5) violation. Finally, the Board found that Overnite would raise similar defenses to both allegations.

The court in *Overnite* found that in that circuit its rule was that “Section 10(b) is to be broadly construed to permit the [General Counsel] to include in the complaint any matter of the same general nature as that asserted in the charge” (*NLRB v. Overnite Transportation Co.*). It found that the 8(a)(1) allegation of a threat arose during the same organizational campaign as characterized by the employer’s conduct at the bargaining table and were both part of the same “crusade directed against the Union” thus supporting the Board’s

<sup>17</sup>Sec. 10(b), in pertinent part, proscribes issuance of complaint “based upon any unfair labor practice occurring more than 6 months prior to the filing . . . and service . . . [of the charge].”

findings that the two allegations involved the same legal theory and arose out of the same sequence of events.” (Id. at 820.)<sup>18</sup>

In view of the court’s gloss of the Board’s *Redd-I* decision supra, I conclude that, notwithstanding the amendment of the complaint alleging the 8(d) violation did not arise out of the same section of the Act as the original 8(a)(5) allegation, Respondent’s argument, to that extent, must be rejected. To the extent that the amendment alleging renewal of the contract relates to the same “legal theory” as that in the underlying complaint and charge, however, I regard Respondent’s argument as having merit. On this ground alone, I conclude that granting General Counsel’s right to amend the complaint to allege *renewal* of the contract in the face of its prior contrary allegation, while it may be excused from not alleging the same section of the Act, can hardly be said to involve the “same legal theory” even within the broad construction allowed by the Seventh Circuit or by the Board.

With regard to the second *Redd-I* element, whether the untimely allegations arose from the same factual situation or sequence of events as the allegations in the pending timely charged, the Board specifically states that it means to inquire whether the untimely allegations involve similar conduct during the same time period with a similar object. Although the Board gives as its example terminations during the same union organizing campaign, I further conclude that under this second rubric, Respondent’s argument has merit. For as will be seen in further discussion, below, the General Counsel is not urging the “same factual situation” as the basis of the otherwise untimely amendment; rather, he is urging the exact opposite: Instead of urging that the contract has terminated, he is now urging the exact contrary factual situation which, I conclude, is inconsistent with the above second step of the *Redd-I* analysis. A directly opposite factual allegation can hardly arise from the same “factual situation.” This necessarily is intertwined with the third step of the *Redd-I* analysis which follows.

I conclude that Respondent’s position with regard to the third element of the *Redd-I* analysis has even greater merit. There, the Board stated that it would inquire as to whether Respondent would raise the same or similar defenses to both allegations and thus whether Respondent reasonably would preserve similar evidence, and prepare a similar case in defending against the new, otherwise untimely allegations. Rather than defending on the factual basis of the substance of collective-bargaining sessions and the parties’ positions to justify the lockout, Respondent is now faced with the assertion that the lockout was illegal per se because it locked out the employees in the face of an automatically renewed contract. The automatic renewal is based on entirely different circumstances: the failure of either party to give timely notice of intent to amend or terminate the contract. Such new and untimely allegations can hardly be said to present Respondent with the ability to raise the same or similar defenses to both allegations or to preserve similar evidence and prepare a similar defense. A lockout based on all the factual

circumstances is a different case, presenting no opportunity for a defense where the lockout is in the face of an automatically renewed existing collective-bargaining agreement. I therefor conclude that I improvidently permitted the General Counsel to amend the complaint and, in part, to try the case on the theory of the automatically renewed contract (based upon untimely notices of termination or amendment by either party) rather than on his original theory which will be treated hereafter. My conclusion of having improvidently granted General Counsel’s motion does not substantially interfere with General Counsel’s theory of a violation based upon the total circumstances of the case.<sup>19</sup> Nor did it, nor does it, interfere with Respondent’s ability to defend.

In addition, the conduct of the parties was entirely consistent with the factual allegations underlying General Counsel’s original allegations, i.e., that the contract terminated on March 4, 1991. Thus, permitting the amendment by adding the otherwise untimely allegation of automatic contract renewal was inconsistent with the *Union’s* expectations, position and conduct from the very beginning of its bargaining with Respondent for a new contract. On December 11, 1990, Lange wrote to Garavaglia (G.C. Exh. 8) that the Union would refrain from further reopened negotiations in December and await the “expiration date of the current labor agreement, and begin negotiations at that time.” Likewise, on January 4, 1991, Lange wrote to Garavaglia and presented the 8(d) notice of termination to Respondent alleging that it was serving “notice to you of termination of the contract between Local 267 . . . and the employees employed at National Metal Processing” (G.C. Exh. 9). Thus the intent of the parties, manifested by prelitigation communications, was that the contract terminated on March 4, 1991. There is no suggestion from either party that they viewed the contract as having been renewed. Thus, in preparing for the case, based on the original complaint and charge containing an assertion that the contract had terminated on March 4, 1991, Respondent, for the 6-month period between the issuance of complaint (June 18, 1991) and its receipt of notice of the otherwise untimely amendment, in or about the week prior to the opening of the the hearing (December 16, 1991), was in the dark concerning its ability to defend the case and particularly prejudiced by its failure to look to the preservation of evidence concerning the renewal of the contract.

Thus, I conclude that I improvidently granted the amendment to the complaint and, reversing that decision, I shall dismiss so much of the complaint as alleges a renewal of the contract and a violation of Section 8(d) of the Act as flowing therefrom. In view of that ruling, I need not reach or decide the questions relating to automatic renewal such as the timeliness of notice and the responsibilities of the parties to give such notice under Section 8(d) of the Act.

Alternatively, I further conclude that my permission to amend the complaint to allege renewal of the contract in violation of Section 8(d) of the Act was improvident as a matter of Board policy. Quite apart from the statutory violation of

<sup>18</sup>The court specifically rejected the employer’s suggestion that the Seventh Circuit rule and the Board rule intimated that the untimely amendment must arise under the same section of the Act in order to be “closely related.” See *NLRB v. Overnite Transportation*, supra at fn. 8.

<sup>19</sup>Of course, the Union may well be adversely affected by my reconsideration of this matter. The Union, in the face of a renewed contract, could reasonably claim that Respondent failed to perform its duties under the renewed contract, including the payment of periodic union dues and fees pursuant to a checkoff clause and other obligations including the obligation to maintain all the terms of the contract in full force and effect.

Section 10(b) in permitting the amendment, the facts show that the parties to the collective-bargaining agreement consistently adhered to an interpretation, as above noted, whereby the contract terminated on March 4, 1991. Such a mutually satisfactory interpretation, as demonstrated by the consistent conduct of both parties, was in furtherance of no unlawful scheme such as depriving employees of statutory rights through an unlawful union security clause, or a restriction on solicitation and distribution of union literature or membership application cards, or restrictions by the employer and union designed to frustrate employee rights concerning loyalties to, or organization by, another labor organization. Rather, the parties' interpretation of the contract concerning its termination date was here wholly innocuous and consistent with their own interests. In consequence of this conclusion, I recommend to the Board that, as a matter of Board policy, the General Counsel should be bound by the contractual interpretation of the parties concerning the termination date. Cf. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

The General Counsel's action, in amending the complaint to show contract renewal, evidently results from a reanalysis of the facts 6 months after the issuance of the complaint and a year after the filing of the charge by which he concluded that a further and different violation of the Act, due to additional facts, occurred. There is nothing in the record to show that the General Counsel acted at the instigation of the charging party in the untimely amendment or that the evidence on which the General Counsel acted had been hidden or suppressed by Respondent. On the contrary, General Counsel must have been in possession of both the terms of the expired contract and most particularly, Respondent's February 25 refusal to abide by any claim of contract renewal (G.C. Exh. 16) soon after the filing of the first charge on March 7, 1991. The General Counsel, therefore, acted on his own, 6 months after issuing complaint, alleging a new state of facts directly antithetical to his original pleading. The General Counsel's later evaluation of the facts brought him to the conclusion that contrary to his original allegation, he could argue that the contract, by its terms, was renewed in light of the failure of certain conduct of the parties to forestall automatic renewal. The General Counsel's late reevaluation of his factual and legal situation amounted to going off "on a lark of his own" contrary to the spirit, if not the text, of restrictions on General Counsel's conduct such as that found in *NLRB v. Fant Milling Co.*, 360 U.S. 301 (1959). In short, I recommend to the Board that, quite apart from any violation of Section 10(b) of the Act, the General Counsel, as a matter of Board policy, should not be permitted to amend the complaint to allege the renewal of the contract when the parties, on this record, as a matter of their own lawful interpretation of their own collective-bargaining agreement, concluded that the contract terminated on March 4, 1991.

#### B. Violations of Section 8(a)(5) and (1) of the Act

##### 1. Lockout to coerce Union to accept offer containing a unit change

The central allegation of the consolidated complaint (par. 24) asserts that the lockout commencing March 5, 1991, was in retaliation for the Union's refusal to acquiesce in Respondent's demands concerning the terms of a new contract, and as a means to implement terms and conditions of em-

ployment which unilaterally deprive employees of seniority and other rights previously enjoyed.

I conclude that not only did Respondent's March 5 pre-impasse unilateral implementation of its March 4 contract offer, containing the unit change, violate Section 8(a)(5) but, more specifically, that its March 5 lockout to coerce the Union to accept the unilaterally implemented terms a fortiori violates Section 8(a)(5); and that its refusal to permit its unit employees to work except on those terms violates Section 8(a)(3) and (1) of the Act.

As the Board has recently noted in *Field Bridge Associates*, 306 NLRB 322, 334 (1992):

In *Boilermakers Local 374 v. NLRB*, 380 U.S. 300 (1965), the Court held that the employer did not violate Section 8(a)(1) or (3) by locking out employees after an impasse had been reached. In *Harter Equipment*, 280 NLRB 597 (1986), the Board held that an employer may use temporary replacements during a lockout for the purpose of bringing economic pressure to bear in support of its legitimate bargaining demands. See also *B-Bar-B, Inc.* 281 NLRB 250 (1986); *National Gypsum Co.*, 281 NLRB 593 (1986); *Birkenwald Distribution Co.*, 282 NLRB 1954 (1987). In *Boilermakers Local 88 v. NLRB*, 858 F.2d 756 (D.C. Cir. 1988), the Court agreed with the Board's conclusion that an employer may engage in an offensive lockout while using temporary replacements.

More than 35 years ago, in *Douds v. Longshoremen ILA*, 241 F.2d 278 (2d Cir. 1957), the Board, with court approval, distinguished between private bargaining over conditions of employment and administrative determination of the unit appropriate for bargaining (*Douds v. Longshoremen ILA*, supra at 282). The court observed that the parties cannot bargain meaningfully about wages or hours or conditions of employment unless they know the unit for bargaining. That question is reserved for the Board or the mutual agreement of the parties. Indeed, the court held that the process of alteration of the unit whether by agreement or board action, must involve no disruption of the bargaining process, *ibid*.

The scope of an established collective-bargaining unit is a nonmandatory subject of bargaining on which neither party may insist to impasse. *Syncor International Corp.*, 282 NLRB 408, 409 (1986).<sup>20</sup> Consistent with this principle, the Board has held that it is evidence of overall bad-faith bargaining (an allegation not present in the instant complaint) for an employer to continually insist, during bargaining, on a change of the established unit. Such bargaining tactics demonstrate "a reluctance . . . to attempt to reach a collective-bargaining agreement." *Beyerl Chevrolet*, 221 NLRB 710 (1975); *Preterm, Inc.*, 240 NLRB 654 (1979). Whether or not the bargaining reaches a state of impasse (a status nowhere claimed herein by any party), it takes more than bargaining to change the scope of the unit. It takes mutual agreement or Board action. *Metro Medical Group*, 306

<sup>20</sup> An unlawful impasse on a nonmandatory subject is reached not where the nonmandatory subject is merely present in the impasse offer, but where the presence of the nonmandatory subject itself gives rise to the impasse. *Chicago Beef Co.*, 298 NLRB 1039 (1990), *enfd. mem.* 955 F.2d 906 (1991); *Latrobe Steel Co. v. NLRB*, 630 F.2d 171 (3d Cir. 1980).

NLRB 373 (1992) citing the underlying Board rule established in *Arizona Electric Power*, 250 NLRB 1132 (1980); *Carolina Telephone Co.*, 258 NLRB 1387 (1981).

With regard to the lockout as an economic weapon, the Board has followed footnote 6 in *Harter Equipment Co.*, 280 NLRB 597, 599 (see *D.C. Liquor Wholesalers*, 292 NLRB 1234, 1258 (1989)):

The Board has held that the absence of impasse does not of itself make a lockout in support of bargaining demands unlawful . . . ; neither does the absence of any reasonable fear of strike. We likewise find that these factors are not dispositive with respect to the lockout use of temporary employees . . . .

The Board's *Harter Equipment* rule, however, must be read in the context of *Boilermakers Local 374 v. NLRB*, 380 U.S. 300, 318, as explained in *Teamsters Local 639 (D.C. Liquor Wholesalers) v. NLRB*, 924 F.2d 1082 (D.C. Cir. 1991): a "bargaining lockout" must be for the *sole purpose* of bringing economic pressure to bear in support of the employer's *legitimate bargaining position* (emphasis added). *Boilermakers Local 374*, 380 U.S. at 318. The court of appeals, in *D.C. Liquor Wholesalers*, affirming the Board, held, that a no-impasse bargaining lockout and use of temporary employees was not in support of a legitimate bargaining position where the lockout was used to coerce the union to accept a unilaterally implemented no-impasse final offer, 924 F.2d 1082, and violated Section 8(a)(5), (3), and (1) of the Act, *ibid*.

In the instant case, the Board certified the production and maintenance unit including truckdrivers and shipping and receiving employees in 1974. This unit was kept intact (except for the historical agreement of the parties to *exclude* professional employees see G.C. Exh. 4, the collective-bargaining agreement with *Atlantic Western* expiring March 4, 1991). Respondent's December 5 proposal during reopened negotiations maintained the contract unit. But in bargaining in February for a new contract, Respondent's first noneconomic proposal (G.C. Exh. 15; February 18, 1991) requests deletion from the existing unit of truckdrivers. Respondent's second noneconomic proposal (G.C. Exh. 18) of February 26, 1991, contains the same unit change demand. So does the company offer immediately preceding the lockout of March 4 (G.C. Exh. 19). As of March 4, the record shows that although there may have been negotiations concerning a letter of understanding to remove the truckdrivers and to place all unit employees into one production employee category, the Union never submitted the letter and, according to both Lange's and Garavaglia's uncontradicted testimony, never agreed to any change in the unit. Garavaglia admitted that at the March 4 meeting, immediately preceding the March 5 lockout, the parties discussed, as they consistently discussed, the change of the unit description so as to eliminate the separate category of maintenance employees and include them in an overall unit (Tr. 487-488). As Garavaglia further conceded, Lange, on March 4, the day preceding the lockout, refused to change the unit (Tr. 489). Moreover he conceded that he originally wanted to eliminate maintenance employees completely from the collective-bargaining unit (Tr. 489-490) and I have not credited his alleged March 4 change of mind when he merely wanted them included in an overall produc-

tion unit along with shipping and receiving and truckdriver employees (Tr. 490).<sup>21</sup>

I therefore conclude that, in the absence of Board action, there was, as Garavaglia conceded, consistent rejection by Lange of any alteration of the unit (Tr. 141-142). In the light of Respondent's continual insistence on a change of the unit; in light of Lange's continual rejection of such change up to and including March 4, 1991; and in light of Respondent's initiation of its lockout and hiring of temporary employees on March 5, 1991, for the purpose of exerting lockout pressure on the Union to accept its March 4 offer, including the exclusion from the unit specified in its written offer of March 4, 1991 (G.C. Exh. 19 deleting "truckdrivers" from the unit, while Respondent was orally simultaneously demanding exclusion of the maintenance employee category); and in view of Respondent's refusal to permit its union employees to continue to work beyond the termination of the contract except on condition of accepting the terms and conditions of employment last offered, I conclude that Respondent initiated, and continued, the lockout of March 5, 1991, consistent with the allegations of the complaint: in order to coerce the Union and its employees to acquiesce in Respondent's demands in respect to terms of a new contract which it offered on March 4, 1991. The terms of the March 4 offer were implemented when the lockout started on March 5. Since Respondent's written and oral contract demands of March 4 included the change in the unit, and since the March 4 offer was implemented on March 5, the lockout was necessarily in support of a contract offer which, absent the Union's agreement, was instituted in order to coerce the Union into accepting a change in the existing unit, which is inconsistent with the lawful use (not for the "sole purpose [to] support [a] legitimate bargaining position") of the economic weapon of lockout under *Boilermakers Local 374 v. NLRB*, 380 U.S. 300 (1965), and *Harter Equipment*, 280 NLRB 597 (1986). See *Teamsters Local 639 (D.C. Liquor Wholesalers) v. NLRB*, 924 F.2d 1082. While it is a legitimate bargaining position to demand or request that the Union acquiesce in a change of the unit, it is not lawful to lock out union employees in furtherance of that demand<sup>22</sup> rather than seeking Board action. Compare: *Riverside Cement Co.*, 296 NLRB 840 (1989). Consistent with the allegations of the complaint, therefore, I conclude that Respondent's March 5, 1991 lockout was not *solely* in support of a "legitimate bargaining position" and violated its bargaining obligation under Section 8(a)(5) of the Act. *Boilermakers Local 374*,

<sup>21</sup> The credited testimony is that Respondent consistently sought the exclusion of maintenance employees from the unit and from union membership. On April 26, Pulis told Lange he wanted the maintenance employees out of the unit and out of the Union.

<sup>22</sup> Again, the uncontradicted and credited Lange testimony is that as late as in his April 26, 1991 conversation with Respondent's plant manager, Joe Pulis, when he picked up Respondent's "final offer" 6 weeks after the March 5 lockout, Respondent's "final offer," as Pulis told Lange, did not have the maintenance classification in the unit. Pulis told Lange that Respondent wanted this category to be "nonunion or exempt" (Tr. 138). Garavaglia, himself, told Lange that he did not want to merely have one classification; he wanted to delete maintenance employees and lab technicians from the unit because "they did not belong in the unit" (Tr. 211). Thus, from beginning to end, Respondent, despite Garavaglia's variable testimony on the point, was insisting, prelockout, lockout, and postlockout, on substantial unit change.

supra, *D.C. Liquor Wholesalers*, supra. In addition, I find that, as alleged, the lockout of employees because they would not accept the implemented terms and conditions of employment and Respondent's hiring of nonunion employees on a temporary basis in order to perform unit work, constituted unlawful discrimination within the meaning of Section 8(a)(3) of the Act. In sum, Respondent's March 5, 1991 lockout violated Section 8(a)(1), (3), and (5) of the Act as alleged. *Teamsters Local 639 (D.C. Liquor Wholesalers) v. NLRB*, supra.

## 2. Violation of Section 8(a)(5); preimpasse unilateral implementation

Garavaglia's insistent and continuous testimony was that the parties never reached impasse in their bargaining. Neither the General Counsel nor the Union has submitted evidence or, more important, urged, that impasse was ever reached. Respondent nevertheless, in the absence of impasse, instituted a unilateral change in the terms and conditions of employees performing unit work. Indeed, it conditioned its willingness to allow its unit employees to work on expiration of the March 4, 1991 agreement, on their acceptance of Respondent's final proposal of March 4, 1991 (G.C. Exh. 19). This proposal had substantial changes in wages, incentive plan, etc. It is certainly well established that absent overall impasse, as here, an employer may not unilaterally change the terms and conditions of employment; rather, it must bargain in good faith to overall impasse before unilaterally changing the terms and conditions of employment in an expired collective-bargaining agreement. To fail to do so, violates Section 8(a)(5) of the Act as alleged herein. *NLRB v. Katz*, 369 U.S. 736, 743 (1962); *Intermountain Rural Electric Assn.*, 305 NLRB 783 (1991), and collected authorities. To institute an otherwise unlawful lockout in aid of such a unilateral change, makes both the lockout and the unilateral change a violation of Section 8(a)(5) of the Act, as alleged. *Teamsters Local 636 (D.C. Liquor Wholesalers) v. NLRB*, supra.

There is no suggestion, in defense of Respondent's unilateral implementation, that the Union's bargaining effort was so redolent of delay or bad faith as to constitute an excuse or rationalization to permit the otherwise unlawful unilateral change<sup>23</sup> (*M & M Contractors*, 262 NLRB 1472 (1982); *Southwestern & Portland Cement*, 289 NLRB 1264 (1988)) nor is there a suggestion of some overwhelming economic emergency that prompted such action. See *Intermountain Rural Electric Assn.*, supra, citing *Winn-Dixie Stores*, 243 NLRB 972, 974 fn. 9 (1979), or of a strike, imminent or otherwise, *Marquette Co.*, 285 NLRB 774, 775 (1987).

## 3. Violation of Section 8(a)(1) and (5) of the Act; refusal to process grievances

Union President Arthur Evans credibly testified that in a telephone conversation occurring in the afternoon immediately following the March 5 lockout, he spoke with Garavaglia and asked him to discuss unresolved grievances with the Union. Garavaglia told him that the contract was

"dead" and the grievances were "dead" (Tr. 246). In fact, there were no collective-bargaining or grievance meetings between that March 5 conversation and Respondent's April 3, 1991 letter to the Union (G.C. Exh. 28).

Garavaglia never specifically denied Evans's testimony. Rather, he admitted (Tr. 547-548) that Evans telephoned him and wanted to discuss grievances. To the extent that Garavaglia testified that he "had no problem with discussing grievances" and never refused to discuss grievances but merely wanted to discover the format in which they should be discussed and wanted to check with the industrial board as well as the NLRB to get the format for grievance discussion, I specifically discredit his testimony. Not only was Evans, in my observation, a credible witness, but Garavaglia's failure to specifically deny the colorful expression which Evans' testimony placed in his mouth, together with the implausible version given by Garavaglia (Tr. 547-548), that he needed some sort of advice and guidance in how to formulate or discuss grievances (a labor relations consultant with more than 20 years' experience) is not acceptable in terms of credibility.<sup>24</sup> This adverse credibility resolution is further supported by the Union's immediate filing of an amended unfair labor practice charge in Case 7-CA-31616 on March 7, 1991, 2 days after the telephone conversation, which Respondent received on March 11, 1991 (G.C. Exhs. 1(c) and 1(d)), according to the post office green card in evidence. That charge amends the existing charge solely by alleging Respondent's refusal to "process existing grievances."

What followed, again in support of the above credibility resolution of what Garavaglia actually said to Evans, is Garavaglia's April 3, 1991 letter (G.C. Exh. 28) to Evans: "to clarify if there has been a misunderstanding, the Company . . . is ready and willing to have any meeting on any outstanding grievance under the old contract." I find that there was no "misunderstanding."

I therefore conclude that, as alleged (complaint pars. 25(a) and (b)), contrary to Respondent's pleaded denial, Respondent on or about March 5, by telling Evans that the pre-existing grievances were "dead," refused to negotiate and bargain with respect to preexpiration grievances in violation of Section 8(a)(5) and (1) of the Act. *Indiana & Michigan Electric Co.*, 284 NLRB 53 (1989). Respondent's April 3 letter is quite clearly an attempt to backtrack on and ameliorate its March 5 refusal. In addition, there is evidence, uncontradicted on this record, that Respondent, in fact, did process all the grievances and General Counsel does not argue to the contrary. Nevertheless, Respondent's March 5 declaration that the grievances were "dead" is a refusal to negotiate and bargain with respect to those grievances for the period March 5 through April 3, 1991. Respondent's April 3 letter neither acknowledges that refusal nor suggests that it would not repeat that refusal. It merely characterizes the unlawful refusal as a "misunderstanding" (G.C. Exh. 28). Respondent's attempt to "clarify" the "misunderstanding" clearly does not meet the Board's test for repudiation of the unfair labor practice. *Passavant Memorial Hospital*, 237 NLRB 138 (1978), requires a disavowal of the unlawful Act. Respondent's April 3 letter followed by almost a month the

<sup>23</sup> To unilaterally implement a nonconsented unit change, even where union conduct otherwise permits unilateral implementation, would constitute a violation of Sec. 8(a)(5) since only mandatory subjects can be implemented post-good-faith impasse.

<sup>24</sup> In addition, I was not impressed with Garavaglia's credibility concerning the Earhart incident, below in the text.

filing of the amended unfair labor practice charge and was couched in terms to avoid the admission of wrongdoing. On these elements, alone, Respondent's April 3 letter fails to meet the Board's test for repudiation of an unfair labor practice (*Passavant Memorial Hospital*, supra at 139).

#### 4. Alleged violation of Section 8(a)(3)

Conditioning employee reemployment on resignation of employment as a Respondent employee

While there was no evidence of Respondent responsibility for conditioning reemployment of unit employees upon their resigning from Respondent as an employee employed at National Metal Processing (as alleged in par. 24(b) of the complaint), the evidence does show that old unit employees were offered employment conditioned on their executing letters, provided and formulated by Respondent, indicating that their wage rates and other terms and conditions of employment were those terms and conditions of employment unilaterally implemented by Respondent. Since I have concluded, above, that the unilateral implementation of terms and conditions of employment was a violation of Section 8(a)(5) of the Act because implemented both without benefit of impasse and in furtherance of an unlawful lockout, it follows that Respondent's conditioning reemployment of its employees on their acceptance of these unlawfully imposed terms and conditions of employment likewise violates paragraph 8(a)(3) of the Act. I so find. To the extent that Section 24(b) of the complaint contains further or other allegations, I recommend to the Board that such allegations be dismissed.

#### 5. Alleged violation of Section 8(a)(1) of the Act

Complaint paragraph 26, in substance, alleges that Respondent (Garavaglia), in violation of Section 8(a)(1) of the Act, offered to organize the replacement employees as a gift to the Teamsters, offered assistance in obtaining the names of the replacements and encouraged a meeting to negotiate a collective-bargaining agreement. I recommend to the Board that that allegation be dismissed.

The evidence undoubtedly demonstrates, and I find, that, contrary to Garavaglia's denial, Earhart's testimony was credible. Again, Earhart testified that on April 17, 1991, Garavaglia approached him and his president, Gary Proctor, and requested that they organize Respondent's replacement employees essentially because he was having trouble persuading the incumbent union to accept Respondent's terms and conditions of employment for a new contract. Upon balancing the circumstances and from my observation of the witnesses, I credit Earhart's testimony and do not credit Garavaglia's version that Earhart approached him with the same offer. Indeed, a review of Garavaglia's contrary version—replete with Teamsters Local President Proctor lecturing his organizer Earhart on the niceties of lawful organizing—is fatuous and unbelievable.

Notwithstanding that Garavaglia's offer to Earhart and Proctor on April 17, 1991, certainly demonstrated Garavaglia's and Respondent's bad-faith bargaining from that day forward (at the time Respondent was engaged in grievance handling and further contract negotiations with the Union), there is no demonstration on this record that this conversation reached the ears of the employees. It may well be true that certain violations of Section 8(a)(1) of the Act do not

require employee knowledge of Respondent conduct. Thus, more than 50 years ago, the courts, enforcing the Board rule, have held that even in the absence of employee knowledge, an employer's acts of surveillance and espionage on their union activities violates Section 8(a)(1) of the Act. *NLRB v. Grower-Shipper Vegetable Assn.*, 122 F.2d 368 (9th Cir. 1941).<sup>25</sup>

In *Fifteenth Avenue Ironworks*, 279 NLRB 643 (1986), the Board did not find a violation of Section 8(a)(1) because the employee was not aware of the allegedly unlawful conduct. In that case, an employer's otherwise unlawful threat of physical violence, made to a union official in the presence of an employee, was held to be no violation of Section 8(a)(1) because the employee did not understand the Italian language in which the employer's threat was delivered to the Italian-speaking union official. *Id.* at 654.

In the instant case, while Garavaglia's invitation to Earhart to engage in unlawful activity hardly evinces a state of mind consistent with present or future good faith bargaining with the Charging Party, there is no suggestion that any "employee" (other than Earhart himself) heard the invitation and there is certainly no proof that the unit employees were ever aware of this conversation or that Earhart or the Teamsters' Union ever acted on the invitation. On the basis of foregoing finding of lack of employee awareness, I recommend that paragraph 26 of the consolidated complaint be dismissed.

#### CONCLUSIONS OF LAW

1. Respondent, Branch International Services, Inc., at all material times, has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. The Union, Local No. 267, International Union, Allied Industrial Workers of America, AFL-CIO, at all material times, has been and is a labor organization within the meaning of Section 2(5) of the Act.

3. The following employees of Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

All production and maintenance employees including truckdrivers and shipping and receiving employees employed at National Steel Processing Inc., Detroit, Michigan, excluding all office clerical employees, guards and supervisors and professionals as defined in the Act.

4. At all material times, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the above unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment and other terms and conditions of employment.

5. Commencing on and after March 5, 1991, and continuing to date, Respondent, in violation of Section 8(a)(5) of the Act, has unlawfully refused to bargain in good faith with the Union in the above unit by instituting and inaugurating a lockout of its employees in support of its contract offer of March 4, 1991, in order to put economic pressure on the

<sup>25</sup> As noted in the text immediately above, in view of later Board cases, it seems that the Ninth Circuit's broader statement, that there may be "interference, restraint or coercion" generally without employee knowledge, need not necessarily be applied to cases other than unlawful surveillance.

Union to accept the offer which provided, inter alia, that the Union accept a change in the bargaining unit as a condition of agreement.

6. Commencing on or about March 5, 1991, and continuing to date, Respondent violated Section 8(a)(5), (3), and (1) of the Act by unilaterally implementing its final contract offer, locking out its employees, and hiring replacement employees for locked-out unit employees who, nevertheless, at all material times desired to return to work, all without having reached lawful impasse with the Union, and without any other legal justification, in order to coerce the Union into accepting the terms of the unilaterally implemented offer, including a change in the bargaining unit, a nonmandatory subject of bargaining.

7. Commencing March 5, 1991, and thereafter, Respondent violated Section 8(a)(5) and (1) of the Act by refusing, at the Union's request, to entertain and process grievances which arose under the collective-bargaining agreement which expired March 4, 1991.

8. By implementing, commencing March 5, 1992, a change in the above-described appropriate unit without the consent of the Union or the order of the National Labor Relations Board, Respondent violated Section 8(a)(5) and (1) of the Act.

9. By conditioning further employment on and after March 5, 1991, of its locked-out employees upon their acceptance of the terms of Respondent's unlawfully implemented contract offer, Respondent violated Section 8(a)(3) and (1) of the Act.

#### THE REMEDY

I shall recommend to the Board that Respondent be ordered to cease and desist from its unfair labor practices, including its unlawful lockout, to bargain in good faith with the Union, and to post an appropriate notice and mail to each of its locked-out employees a copy of that notice.

I shall also recommend that Respondent be ordered to take additional affirmative action to remedy the consequences of the unlawful lockout of employees and its unlawful unilateral changes in terms and conditions of employment. I shall therefore recommend that Respondent offer its locked-out employees, including those temporarily replaced, immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, discharging, if necessary, all occupants of the jobs of locked-out employees, without prejudice to seniority and other rights or privileges previously enjoyed. In addition, I shall recommend that Respondent be ordered to make each of its locked-out employees whole for any loss of earnings and other benefits suffered as a result of Respondent's unlawful lockout and unilateral changes in terms and conditions of employment. *Ogle Protection Service*, 183 NLRB 682 (1970), enf'd. 444 F.2d 502 (Cir. 6th 1971). Backpay shall be paid according to *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>26</sup>

<sup>26</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be

#### ORDER

The Respondent, Branch International Services, Inc., Auburn Hills, Michigan, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain in good faith with Local No. 267, International Union, Allied Industrial Workers of America, AFL-CIO (the Union) as exclusive bargaining representative of employees in the below-described appropriate bargaining unit by instituting and inaugurating a lockout of its employees in support of its contract offer, thus putting economic pressure on the Union to accept an offer which provided, inter alia, that the Union accept a change in the bargaining unit as a condition of agreement.

(b) Refusing to bargain in good faith with the Union, as described in paragraph (a), above, by unilaterally implementing its contract offer, locking out its unit employees, and hiring temporary replacement employees for locked-out employees, who, nevertheless, at all material times desired to return to work, without having reached lawful impasse with the Union and without any other legal justification, all in order to coerce the Union into accepting the terms of the unilaterally implemented offer.

(c) Implementing a change in the below-described appropriate unit without the consent of the Union or the order of the National Labor Relations Board.

(d) Refusing to bargain in good faith with the Union, as described above in paragraph (a), by refusing to entertain and process grievances which arose under the collective-bargaining agreement which expired March 4, 1991.

(e) Conditioning further employment of its locked-out employees, commencing March 5, 1991, on their acceptance of the terms of Respondent's unlawfully implemented contract offer.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain in good faith with the Union as the exclusive representative of the employees in the following appropriate unit concerning rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed contract:

All production and maintenance employees, including truckdrivers, and shipping and receiving employees, employed by Respondent at National Metal Processing, Inc., Detroit, Michigan, excluding all office clerical employees, guards, supervisors and, professional employees as defined in the Act.

(b) On request of the Union, forthwith reinstate the rates of pay, wages, hours, or other terms and conditions of employment of bargaining unit employees that were unilaterally changed after the expiration of the contract on March 4, 1991.

adopted by the Board and all objections to them shall be deemed waived for all purposes.

(c) Offer to all unit employees on Respondent's payroll as of March 4, 1991, including laid-off employees, who were unlawfully locked out commencing March 5, 1991, full and immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to his seniority or other rights or privileges previously enjoyed, discharging, if necessary, employees hired from other sources, and make them whole for any loss of wages, bonuses, holidays, vacations, and any expenses covered under the expired contract as prescribed in the remedy section of this decision.

(d) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay and other moneys due under the terms of this Order.

(e) Post at Auburn Hills, Michigan facility and mail to each employee on its payroll as of March 4, 1991, copies of the attached notice marked "Appendix."<sup>27</sup> Copies of the notice, on forms provided by the Regional Director for Region 7, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

<sup>27</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

#### APPENDIX

##### NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT refuse to bargain in good faith with Local No. 267, International Union, Allied Industrial Workers of America, AFL-CIO (the Union) as exclusive bargaining representative of employees in the below-described appropriate bargaining unit by instituting and inaugurating a lockout of our employees in support of our contract offer, thus putting economic pressure on the Union to accept an offer which

provided, inter alia, that the Union accept a change in the bargaining unit as a condition of agreement.

WE WILL NOT refuse to bargain in good faith with the Union, as described above, by unilaterally implementing our contract offer, locking out our unit employees, and hiring temporary replacement employees for our locked-out employees, who, nevertheless, at all material times desired to return to work, without having reached lawful impasse with the Union and without any other legal justification, all in order to coerce the Union into accepting the terms of the unilaterally implemented offer.

WE WILL NOT implement the change in below-described appropriate unit without the consent of the Union or the order of the National Labor Relations Board.

WE WILL NOT refuse to bargain in good faith with the Union, by refusing to entertain and process grievances which arose under the collective-bargaining agreement which expired March 4, 1991.

WE WILL NOT condition further employment of our locked-out employees upon their acceptance of the terms of our unlawfully implemented contract offer.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of their rights guaranteed them by Section 7 of the Act.

WE WILL, on request, bargain in good faith with the Union as the exclusive representative of our employees in the following appropriate unit concerning rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed contract:

All production and maintenance employees, including truckdrivers, and shipping and receiving employees, employed at National Metal Processing, Inc., Detroit, Michigan, excluding all office clerical employees, guards, supervisors and professional employees as defined in the Act.

WE WILL offer to all our unit employees on our payroll as of March 4, 1991, including laid-off employees, who were unlawfully locked out commencing March 5, 1991, full and immediate reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions without prejudice to their seniority or other rights and privileges previously enjoyed, discharging, if necessary, employees hired from other sources, and make them whole for any loss of wages, bonuses, holidays, vacations and other expenses covered under the expired contract.

WE WILL, on request of the Union, forthwith reinstate all rates of pay, wages, hours, and other terms and conditions of employment of our bargaining unit employees that were unilaterally changed after the expiration of the contract on March 4, 1991.

BRANCH INTERNATIONAL SERVICES, INC.